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Date of Decision: 8th January 1996

CRIMINAL APPEAL NO. 665 OF 1988
with
CRIMINAL APPEAL NO. 668 OF 1988

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? No

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

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Shri K.J. Shethna, Advocate, for the Appellant in Criminal Appeal No. 665 of 1988 and for the Respondent in Criminal Appeal No. 668 of 1988

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent in Criminal Appeal No. 665 of 1988 and for the Appellant in Criminal Appeal No. 668 of 1988

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.
(Date: 8th January 1996)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Bhavnagar on 26th May 1988 in Sessions Case No. 94 of 1986 is under challenge by original accused No. 1. The very same judgment has been challenged by the prosecution agency resulting in acquittal of the other three accused. Since both the appeals arise from the same judgment and order of conviction and sentence of original accused No. 1 and acquittal of the other three accused and since common questions of law and fact are found arising in both these appeals, we have thought it fit to dispose of both these appeals by this common judgment of ours.

2. The facts giving rise to these two appeals move in a narrow compass. It is the prosecution version that at about midnight on 23rd April 1986 when one Bhuta Bhura (the deceased for convenience) was sleeping under the berry tree in the compound abutting his house, the appellant in Criminal Appeal No. 665 of 1988 and the respondents in Criminal Appeal No. 668 of 1988 approached him to settle the dispute with respect to partition of the ancestral properties. For the sake of convenience, we have thought it fit to refer to the appellant in Criminal Appeal No. 665 of 1988 and the respondents in Criminal Appeal No. 668 of 1988 as they were arraigned in the sessions case from which both these appeals have arisen. It is the case of the prosecution that accused No.1 at the relevant time was armed with a spear, accused No. 4 with an axe, and accused Nos. 2 and 3 with a ringed stick each. It appears that accused No.3 was the nephew of the deceased. The former wanted a lion's share in partition of the ancestral properties. Thereupon a proposal was made to the deceased to give some more share to his nephew. On refusal on his part to accept such proposal, accused Nos. 2, 3 and 4 held him and accused No.1 inflicted three blows on the person of the deceased. One blow was on the left side of his chest, the second on his left hand and the third on his left leg. At that stage, the deceased started shouting. On hearing his shouts, members of his family got up. His two sons, namely, Manubhai and Dhirubhai, stated to be sleeping in the osari of the house, rushed to the scene. Thereupon the accused fled therefrom. The deceased was carried to government hospital at Palitana. The medical officer thereat gave preliminary treatment and advised the patient to be carried to government hospital at Bhavnagar. The deceased was carried to government hospital at Bhavnagar at about 7 a.m. on 24th April 1986. During the course of his treatment, he succumbed to his injuries at about 5.45 p.m. on the next day, that is, on 25th April 1986. It is the case of the prosecution that the deceased himself gave his complaint to the police Head Constable deputed to investigate into the incident on receipt of some information at the Police Station (A Division) at Bhavnagar. That set the investigation into motion. In the course of investigation, the

accused were apprehended and the muddamal spear was also recovered from accused No. 1. On conclusion of investigation, a charge-sheet against the accused was presented before the learned Judicial Magistrate (First Class) at Palitana charging accused No. 1 with the offence punishable under sec. 302 of the Indian Penal Code, 1860 (the IPC for brief) and accused Nos. 2, 3 and 4 with the offence punishable under sec. 302 read with sec. 114 thereof. Since the trial of the case was beyond the competence of the learned trial Magistrate, the case was committed to the Sessions Court at Bhavnagar for trial and disposal. It came to be registered as Sessions Case No. 94 of 1986. It appears to have been assigned to the learned Additional Sessions Judge for trial and disposal. The charge against the accused was framed on 2nd February 1987. No accused pleaded guilty to the charge. Thereupon they were tried. After recording the prosecution evidence and after recording the further statement of each accused under sec. 313 of the Code of Criminal Procedure, 1973 and after hearing rival submissions, by his judgment and order passed on 26th May 1988 in Sessions Case No. 94 of 1986, the learned trial Judge convicted accused No.1 of the offence punishable under sec. 302 of the IPC and sentenced him to rigorous imprisonment for life and acquitted the remaining three accused of the charge levelled against them. That aggrieved both accused No.1 with respect to his conviction and sentence and the prosecution agency with respect to acquittal of the remaining three accused. That is how Criminal Appeal No. 665 of 1988 has come to be filed by accused No.1 questioning the correctness of his conviction and sentence and Criminal Appeal No. 668 of 1988 by the prosecution agency questioning the correctness of the acquittal of the remaining three accused.

3. The learned trial Judge has based his conviction mainly on the so-called dying declaration in the form of the complaint recorded by the Head Constable, named, Mohmedkha Mehmoodkhan Baloch (Prosecution Witness No. 4 at Ex. 23) attached to the A Division City Police Station at Bhavnagar. The learned trial Judge has also relied on the ocular account of the incident given by one son of the deceased, named, Manubhai (Prosecution Witness No. 11 at Ex. 36). The prosecution has also placed reliance on the oral dying declaration stated to have been made by the deceased before one Hamlubhai Jodhubhai (Prosecution Witness No. 6 at Ex. 27).

4. We think that the so-called dying declaration recorded by Prosecution Witness No.4 at Ex. 23 could not be relied on for the purpose of fastening any criminal liability on any of the accused, much less on accused No. 1. The reason therefor is quite simple. It was recorded by one Head Constable attached to the A Division City Police Station at Bhavnagar. He was deputed to investigate into the matter on receipt of information

by the A Division City Police Station presumably from the government hospital at Bhavnagar. It thus becomes clear that the so-called dying declaration was recorded in the course of investigation. It would undoubtedly be admissible in evidence in view of sec. 32 of the Indian Evidence Act, 1872 read with sec. 162(2) of the Code of Criminal Procedure, 1973. However, as transpiring from the evidence of Prosecution Witness No.4 at Ex. 23, he was under an impression that he had gone to record the statement of the victim with respect to the incident. The witness at Ex. 23 has clearly admitted that he did not obtain any certificate from the medical officer concerned whether or not the victim was in a fit state of mind to give any dying declaration. The witness at Ex. 23 has further admitted that he did not think it fit to get the dying declaration of the victim recorded by some Executive Magistrate as the witness was under an impression that he had gone there to record the police statement of the victim. The medical officer treating the deceased in the government hospital at Bhavnagar has not been examined by and on behalf of the prosecution for the reasons best known to it. In absence of any medical evidence in that regard, it would be doubtful whether or not the victim of the incident was in a fit state of mind to give his version of the incident at the relevant time. It transpires from the evidence on record that the deceased sustained serious injuries at the relevant time. Dr. C.C. Kothari at Ex. 45 was the first person to examine him in the government hospital at Palitana. The witness at Ex. 45 has clearly deposed that, though the witness was able to speak, such act of speaking on his part would aggravate his pain and suffering. In that view of the matter, it would be difficult for the victim to have spoken in great detail about the incident in question. His complaint as recorded by the witness at Ex. 23 is at Ex. 24 on the record of the case. It is too detailed and elaborate to be believed. As pointed out hereinabove, any act of speaking on the part of the victim would have aggravated his pain and suffering as deposed to by Dr. C.C. Kothari at Ex. 45. In that case, it would pass anyone's comprehension as to how such a detailed and elaborate account of the incident could have been given by the deceased to Prosecution Witness No.4 at Ex. 23.

5. In this connection a reference deserves to be made to the binding ruling of the Supreme Court in the case of Dalip Singh and others v. State of Punjab reported in AIR 1979 SC 1173. It has been held therein:

> Although a dying declaration recorded by a police officer during the course of investigation is admissible under S. 32 of the Evidence Act in view of the exception provided in sub-s. (2) of S. 162, Criminal P.C., 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution

> satisfies the court as to why it was not recorded by a Magistrate or by a Doctor. The practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged. This is not to suggest that such dying declarations are always untrustworthy, but, what has to be emphasised is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.

It must be fairly stated that the learned trial Judge has relied on the aforesaid statement of law enunciated by the Supreme Court in its aforesaid binding ruling. The learned trial Judge however appears to have lost sight of what has been highlighted in the aforesaid dictum of law. In that case also the dying declaration recorded by a police officer was left out of consideration though on the ground that it contained a statement which was a bit doubtful. However, what has been highlighted by the Apex Court in the aforesaid dictum of law is to the effect that a dying declaration recorded by a police officer in the course of investigation can be relied on provided other reliable methods of recording dying declaration could not be resorted to for compelling reasons. The learned trial Judge, with respect, appears to have lost sight of absence of compelling reasons for not availing of better and more reliable methods of recording the dying declaration of the deceased.

6. It is an admitted position on record that the deceased was first treated by Dr. Kothari at Ex. 45 working in the government hospital at Palitana. The witness at Ex. 45 has clearly admitted in his evidence that he did not inform the police of the incident though it was his duty to do so as it was clearly a medico-legal case. It is again an admitted position on record that the deceased was carried to government hospital at Bhavnagar and was admitted thereat at about 7 a.m. on 24th April 1986. He breathed his last the next day, that is, on 25th April 1986, at about 5.45 p.m. He thus remained in hospital as an indoor patient for nearly 35 hours. If he was fully conscious and in a fit state of mind to give his dying declaration as deposed to by the witness at Ex. 23, services of an Executive Magistrate could have been availed of for recording his dying declaration. Even the medical officer in charge of treating the deceased at the relevant time could have deposed as to what the deceased stated to him about his injuries in the course of his treatment. No explanation whatsoever has been brought on record by and on behalf of the prosecution to show or to suggest why better and more reliable methods of recording the dying declaration of the deceased were not resorted to by and on

behalf of the investigating agency at the relevant time. In that view of the matter, the so-called dying declaration in the form of the complaint at Ex. 24 on the record of the case has to be taken out of consideration in this case in view of the aforesaid binding ruling of the Supreme Court in the case of Dalip Singh (supra). With respect, the learned trial Judge was in error in mainly relying on the so-called dying declaration of the deceased for fastening the criminal liability on accused No.

7. Learned Additional Public Prosecutor Shri Divetia has then invited our attention to the ocular account of the incident furnished by Prosecution Witness No. 2 at Ex. 12, Prosecution Witness No. 5 at Ex. 26 and Prosecution Witness No. 11 at Ex. 36. It has been urged by learned Additional Public Prosecutor Shri Divetia that the learned trial Judge has given cogent and convincing reasons for accepting the ocular account furnished by the aforesaid witnesses, more particularly by Prosecution Witness No. 11 at Ex. 36 for fastening the criminal liability to accused No.1. With respect, we find that the learned trial Judge has again fallen into error in relying on the so-called ocular account given by the aforesaid witnesses.

8. So far as Prosecution Witness No.5 at Ex. 26 is concerned, the learned trial Judge has rightly not relied on his oral testimony for the purpose. He was found to be inimical to the accused, more particularly to accused No.3. In that view of the matter, the evidence of Prosecution Witness at Ex. 5 at Ex. 26 has to be taken out of consideration in this case.

9. So far as Prosecution Witness No.2 is concerned, she was a daughter-in-law of the deceased. Her husband, named, Dhirubhai, was the eldest son of the deceased. The learned trial Judge has accepted the defence submission that she could not have been an eye witness to the incident in its true sense of the word. She could have seen presence of certain persons near the body of her father-in-law only after occurrence of the incident. In that view of the matter, the so-called ocular account furnished by her cannot be taken into consideration.

10. That leaves Prosecution Witness No. 11. He was the second son of the deceased. It was suggested to him in his cross-examination that he had attended the katha held at the place of his mother's sister's husband. That suggestion was denied by the witness at Ex. 36. In this connection, the oral testimony of Prosecution Witness No. 8 at Ex. 30 deserves a reference. The witness at Ex. 30 has clearly admitted in his cross-examination that a katha was held at his place between 9.30 p.m. and 12 midnight on 23rd April 1986. He has further stated that both elder sons of the deceased, named, Manubhai and Dhirubhai, attended the katha and remained seated thereat all throughout. The witness at Ex. 30 has further admitted in his

cross-examination that his house from the house of the deceased was at a walking distance of about 30 to 45 minutes.

11. The witness at Ex. 30 has not been declared hostile. Simply because he has been examined as a panch witness is no ground to disbelieve what he has stated in his cross-examination. We think that the learned trial Judge was in error in not relying on the evidence of the witness at Ex. 30 simply on the ground that he was examined as a panch witness and not as a regular witness. If the version of presence of Manubhai (Prosecution Witness No.11 at Ex. 36) at the house of the witness at Ex. 30 is believed, he could not have seen the incident occurring at midnight at his house. The reason therefor is quite simple. As stated by the witness at Ex. 30, it would take nearly 30 to 45 minutes to cover the distance between his house and that of the deceased. It is everyone's common knowledge that conclusion of the katha is followed by an 'aarti' and then by distribution of 'prasad'. Even if it is assumed that everything was over by 12 midnight, the witness at Ex. 36 would have taken at least half an hour to reach his house. By the time he could have reached the house, the incident was already over by about 12 midnight. In that view of the matter, the presence of Prosecution Witness No.11 at Ex. 36 at his house becomes a doubtful proposition. The ocular account of the incident furnished by him cannot therefore be accepted as a gospel truth for the purpose of fastening criminal liability of the incident to accused No. 1. Besides, the version given by Prosecution Witness No. 11 at Ex. 36 is full of contradictions with his police statement. We do not think it necessary to burden this judgment by highlighting such contradictions. These contradictions may appear minor and trivial at the first sight. Their cumulative effect would however render the ocular account given by him quite doubtful. In that view of the matter, we think it unsafe to rely on the ocular account given by Prosecution Witness No.11 at Ex. 36 for fastening the criminal liability with respect to the incident in question to accused No. 1.

12. So far as accused Nos. 2, 3 and 4 are concerned, the learned trial Judge has doubted their presence at the place of the incident by giving cogent and convincing reasons. However, with respect, the learned trial Judge has not taken into consideration one important feature of the case. It clearly transpires from the evidence on record that no bloodstains were found on the spear, the weapon of offence, as well as at the scene of offence. Apart from that, if we go by the prosecution version, to facilitate the task of accused No.1 in inflicting fatal blows to the deceased with spear, accused Nos. 2, 3 and 4 are stated to have held the deceased. The blows inflicted to the deceased resulted in bleeding injuries. In fact, as transpiring from the evidence on record, the spear had a blade

of 9 inches in length. The injuries caused by it would result in profuse bleeding sprinkling from the wound. That would certainly taint the clothes of accused Nos. 2, 3 and 4 with blood. Their clothes are not shown to be found bloodstained. Cumulative effect of absence of bloodstains from the aforesaid places and spots would raise a serious doubt in the prosecution version. According to well-settled principles of criminal jurisprudence, the benefit of doubt should always operate in favour of the accused.

13. We are fortified in our view by the binding ruling of the Supreme Court in the case of Bir Singh and others v. The State of Uttar Pradesh reported in AIR 1978 SC 59. Therein also, absence of bloodstains at the place where the incident occurred was taken into consideration for doubting the prosecution version. In that view of the matter, the judgment and order of acquittal qua accused Nos. 2, 3 and 4 calls for no interference by this court in the appeal preferred by the prosecution agency.

14. In the result, Criminal Appeal No. 665 of 1988 succeeds. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Bhavnagar in Sessions Case No. 94 of 1986 convicting accused No. 1 of the offence punishable under sec. 302 of the IPC and sentencing him to rigorous imprisonment for life is quashed and set aside. We are told that the appellant (accused No.1) is in jail serving his sentence imposed by the learned trial Judge. He is ordered to be set at liberty if no longer required in any other case.

Criminal Case No. 668 of 1988 fails. It is hereby dismissed. The bail bonds furnished by the respondents (accused Nos. 2,3 and 4) stand cancelled.

The muddamal articles may be disposed of in terms of the directions given by the learned trial Judge in that regard.
